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CHARLES ELMORE C

IN THE

Supreme Court of the United States

October Term, 1952

No. 116

AMERICAN STEAMSHIP COMPANY, as owner of the Str. JOHN J. BOLAND,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY, as owner of the Str. FRANK ARMSTRONG,

Respondent.

PETITIONER'S BRIEF IN REPLY

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about the moment of collision in a fog about as thick as may be imagined (Petition pps. 6, 7). Respondent adverts to the testimony of the master of the ARMSTRONG that she was checked at 11:55 P. M., about 7 minutes before the collision (Respondent's Brief, p. 7) erroneously in its brief giving the time of that claimed check as 11:15 P. M. instead of 11:55 (R. 109, 236).

Respondent also refers to the claim that the ARMSTRONG was abreast Colchester Reef at 11:20 P. M. (Respondent's Brief, p. 6).

It ignores that the log entries as to passing Colchester Reef and as to a check at 11:55 P. M., were not made until an hour after the collision, that slips of a scratch pad on which it was claimed they were made were not preserved and that there was no evidence of any search for them, although there was a Coast Guard hearing aboard the Steamer ARMSTRONG two days following the collision (R. 108).

It was 17 miles between Colchester Reef and Pelee Passage Light (Record 87).

The SCHOONMAKER passed Pelee Passage Light, known also as Middle Ground, at 11:15 P. M. (R. 432), and was abreast the ARMSTRONG about 11:48 P. M. (Petitioner's Brief p. 23). At the SCHOONMAKER's rate of speed of 12.7 miles per hour (R. 433), in the 33 minutes which elapsed between the time the SCHOONMAKER passed Pelee Passage Light until she was abreast the ARMSTRONG, she went about 7 miles (6.98 miles), so that when the ARMSTRONG and SCHOONMAKER were abreast, they were about 10 miles east of Colchester Reef Light.

If the ARMSTRONG passed Colchester Reef Light at 11:20 she made that 10 miles in about 28 minutes or in less than

half an hour, so that she would have had to have gone at a rate of 20 miles or more per hour against her claimed rate of speed of 11 miles per hour (R. p. 86), and far, far in excess of her capacity.

II

Respondent lamely attempts to excuse the ARMSTRONG's alteration in course.

It is only common sense that to blindly make a change of course in a dense fog is the worst kind of navigation, and has been long so regarded in the most authoritative opinions.

III

Respondent impales the ARMSTRONG on both horns of the dilemma in connection with her radar. First, futile effort is made to excuse failure to use the radar in the critical moments before the collision because of claimed defects, although it was good enough to determine that the SCHOONMAKER was about ½ mile to the north of the ARMSTRONG when abreast (R. pps. 95, 118). Second, reliance is placed upon radar in the attempted excuse for the alteration in the course of the ARMSTRONG to the right. Nothing could be more obvious than that if such a radar observation had been correct, the collision could not have occurred because if the BOLAND had been approaching on the left of the ARMSTRONG, as was the reported observation, with the ARMSTRONG going to the right, no collision could have occurred. Therefore, the observation was patently grossly in error.

IV

As to the BOLAND

Respondent has ignored the basis on which the petition rests. Our feeling was that it would be an imposition upon this Court to ask it to review the whole case, and the petition is explicitly rested on the ground that on the evidence from the ARMSTRONG alone, she was guilty of the most grave and flagrant violation of the rules of navigation and of gross negligence.

Respondent emphasizes the testimony from the Steamer ISAAC L. ELWOOD which made both the District Court and the Court of Appeals go awry (Respondent's Brief, p. 9).

The BOLAND passed Pelee Passage Light at 11:22 P. M. (R. 332). There was then visibility for about 2 miles (R. 331).

By a 4 point bearing, the BOLAND was about .7 miles off Pelee Passage Light when abreast (R. 401).

Abreast Pelee Passage Light, the BOLAND'S course was altered to the left for the Toledo course (R. 332, 333, 401).

We have never known before of positive testimony of such a character to be disregarded on the basis of mere suspicion.

There is absolutely no basis for disregarding the evidence that the BOLAND did so alter her course for Toledo at Pelee Passage Light, excepting upon the basis of mere estimates made from the Steamer ELWOOD in fog.

The ELWOOD was eastbound and fog had set in before the ELWOOD passed Colchester Reef Light (R. 142). She was not equipped with radar (R. 142). It was merely an

estimate then that the ELWOOD was 1.1 miles off Colchester Reef when abreast (R. 141).

The master of the ELWOOD admitted that even if a light is *visible* but a 4 point bearing, (or bow and beam bearing) cannot be had, the distance must be estimated from looking over water (R. 145, 150).

The line of the course on the chart of 103 degrees from Colchester Reef to Pelee Passage Light is from a point .75 miles off Colchester Reef Light. Steering on 103 degrees from *1.1* miles off Colchester instead of from .75 miles off Colchester, was bound to take the ELWOOD from left to right across the chart course of 278 degrees from Pelee Passage Light, the Toledo course, for a westbound vessel.

As the 1.1 miles distance off was a mere estimate the ELWOOD may well have been farther to the south.

In any event, the conclusion of the lower courts was based on merest estimates from the ELWOOD which were taken as sufficient to controvert direct and positive evidence and imputed to the BOLAND navigation which was highly improbable, in that she went past a visible aid to navigation with fog coming on, without making the alteration in course for the port to which she was bound.

This conclusion was therefore based on mere suspicion and in disregard of guides to decision recognized by two of the finest admiralty judges who ever sat in the Sixth Circuit (Petitioner's Brief, pps. 23, 24).

V

The place of the Supreme Court in the administration of the admiralty in this country is of first importance.

Recognition was given to the importance of the Supreme Court in the admiralty in the dissenting opinion of Mr. Jus-

tice McKenna in *The Western Maid*, 257 U. S. 419, 435 at follows:

> "The court has kept steadily in mind that the admiralty jurisprudence of the country, as adopted by the Constitution, has a distinctive individuality, and this court has felt the necessity of keeping its principles in definite integrity, and the remedies intact by which its principles can alone be realized."

VI

The petition should be granted

Respectfully submitted,

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